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No. 04-805

In The
Supreme Court of the United States

TEXACO, INC., *et al.*,

Petitioners,

vs.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF PARKER HANNIFIN CORPORATION IN SUPPORT OF PETITIONERS TEXACO, INC., *ET AL.*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF PARKER HANNIFIN CORPORATION IN SUPPORT OF PETITIONERS TEXACO, INC., *ET AL.*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Parker Hannifin Corporation respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of Peitioners Texaco, Inc., *et al.*

Petitioners have consented to the filing of this *amicus* brief. However, Parker Hannifin Corporation has been informed that respondents will not consent to the filing of this brief. Letters from petitioners consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a).

Amicus Parker Hannifin Corporation ("Parker") is a corporation involved in the worldwide manufacture and sale of industrial components. Parker participates in a variety of joint ventures in the United States and in foreign countries. Parker seeks to bring to the attention of this Court the manner in which the Ninth Circuit's decision in this case is likely to deter domestic manufacturers such as Parker from entering into legitimate joint ventures designed to enhance their efficiency. The Ninth Circuit improperly applied a per se approach to an arrangement allowing for the uniform pricing of products in a legitimate marketing joint venture. Application of the per se rule in such circumstances is unjustified, because the pricing arrangement had no additional anti-competitive effect beyond that which occurred by virtue of the integration of the parties' marketing functions in the joint venture. Imposing antitrust liability in such a case will cause companies to refrain from entering into a broad range of marketing joint ventures that are likely to prove

beneficial to consumers. This Court should therefore reject the application of the per se rule to uniform pricing rules implemented by joint ventures that have already effected a combination of the parties' marketing functions.

The Ninth Circuit's approach in this case puts at risk the legitimate business objectives of domestic manufacturers such as Parker. Accordingly, Parker respectfully requests leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether it is per se illegal concerted action under Section 1 of the Sherman Act for an economically integrated joint venture to set the selling price of its own products.

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BRIEF *AMICUS CURIAE* OF PARKER HANNIFIN CORPORATION IN SUPPORT OF PETITIONERS TEXACO, INC., *ET AL.*

INTEREST OF *AMICUS*

Parker Hannifin Corporation ("Parker") is a worldwide manufacturer of industrial products for a wide variety of markets. Parker's sales of such products in its fiscal year ended June 30, 2005 exceeded $8 billion. More than $6 billion of Parker's sales are in the United States. Parker participates in a variety of joint ventures that are essential to the effective operation of its business. The Ninth Circuit's decision to apply the per se rule in this case could put such ventures in jeopardy. If the Ninth Circuit's application of the per se rule were to be affirmed by this Court, joint venture participants would be at risk of antitrust liability simply for implementing internal rules necessary for the effective operation of their ventures. Few domestic manufacturers would be willing to assume such risk. Instead, they would forego legitimate collaborations with their competitors that could have enhanced their efficiency and benefitted American consumers.

ARGUMENT

I. American Firms Should be Encouraged to Enter into Legitimate Joint Ventures

Joint ventures usually have a net beneficial effect on competition. "[M]ost collaborations [among competitors] produce beneficial economic effects. The integration that occurs in a joint venture allows the parties to effect certain

* Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

efficiencies that they could not have achieved on their own."[1] By virtue of combining their previously separate resources, the parties to a joint venture can reduce their risk, achieve economies of scale, lower their costs, effect synergies, and eliminate duplicate and redundant assets. These efficiencies are similar to those that result from mergers.[2] However, in a joint venture, the parties can achieve such efficiencies without causing as significant anti-competitive effects as in a merger, which completely eliminates the parties from all markets in which they previously competed. "Joint ventures ... differ from mergers in a critical way: because they are less integrated than mergers, they allow their partners to continue to compete with each other in the relevant market. While mergers eliminate all competition between the parties, joint ventures, by virtue of their limited scope, leave the parties free to compete in areas not covered by the joint venture."[3]

The net beneficial effects of joint ventures are evident in this case. The integrated Shell/Texaco combination allowed the parties to obtain the efficiencies resulting from the combination of twelve refineries, twenty-three lubricant plants, two research laboratories, 22,000 branded service stations, over 24,000 miles of pipeline, 107 terminals, and

[1] Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1172 (2001).

[2] Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minnesota L. Rev. 1, 7 (1991) ("the efficiencies created by joint ventures are similar to those resulting from mergers – risk sharing, economies of scale, access to complementary resources, and the elimination of duplication and waste.").

[3] *Id.*

approximately 24,000 employees in the Texaco and Shell refining and marketing businesses. Texaco and Shell were able to achieve such efficiencies without effecting a complete merger of all their worldwide operations. Although the joint venture effected a merger of the parties' downstream refining and marketing of branded gasoline, Texaco and Shell remained free to continue to compete in other areas, such as oil exploration.

Since joint ventures have such a great potential to create efficiencies with the minimal possible anti-competitive effects, the courts should adopt an approach that encourages American firms to enter into such arrangements. Unfortunately, the Ninth Circuit's per se condemnation of the Texaco/Shell pricing arrangement will have the opposite effect. Firms will be reluctant to form integrated marketing joint ventures if they are subject to per se antitrust liability simply for engaging in the normal activities incident to such ventures, such as decisions regarding the pricing of joint venture products.

II. A Per Se Approach Is Not Appropriate for the Pricing Arrangement Between Shell and Texaco

Since joint ventures often have a net pro-competitive effect, per se condemnation of such arrangements is not appropriate. If a per se approach is not appropriate for joint ventures themselves, it is also not appropriate for restraints that are inherent in the operation of the venture itself. Such restraints have no anti-competitive effects beyond the joint venture itself. If the joint venture itself does not violate the antitrust laws on its face, neither should any restraints on competition that result inevitably from the formation of the venture.

In this case, Texaco and Shell entered into a joint venture that integrated their branded gasoline refining and marketing businesses in the United States. As a result of that integration, Texaco and Shell ceased to compete against each other in the domestic business of refining and marketing branded gasoline.[4] The pricing arrangement between Shell and Texaco had no anti-competitive effect beyond that which was already pre-ordained by the joint venture between the parties. Since all competition between the parties in the marketing of their separate brands of gasoline had already been extinguished by the joint venture, the pricing arrangement had no additional effect on competition.[5]

Citing an article by *amicus* counsel, Thomas A. Piraino, Jr., the Ninth Circuit concluded that it should determine initially whether the unified pricing of the Texaco and Shell brands was necessary to achieve the

[4] *See* Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 Vanderbilt L. Rev. 1755, 1787-88 (1994) ("A merger analysis is appropriate when the parties have integrated all their existing production or marketing operations in a joint venture. Such integrations eliminate all competition between the parties in the relevant market. As in a merger a single entity (the joint venture) takes the place of the former competitors in the market. These arrangements have the same economic impact as an acquisition of one partner's business by the other, and thus they should be analyzed in the same manner."

[5] *See* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188-89 (2001) ("If a joint venture itself is procompetitive, the courts should uphold any restrictions on competition necessary to achieve its legitimate purposes. Such restraints have no more adverse effect than the joint venture itself, and they do not extend the venture's competitive reach into other markets.").

legitimate purpose of the joint venture.[6] The Ninth Circuit stated that "whether the per se rule applies to a legitimate joint venture's allegedly anti-competitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anti-competitive effects should be disregarded."[7] The Ninth Circuit concluded that the per se rule should apply because "The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies."[8]

The Ninth Circuit's formulation represented a misstatement of the ancillary restraints approach to analyzing joint ventures. Texaco and Shell did not need to show a nexus between the pricing arrangement and the achievement of specific efficiencies by the joint venture. That nexus was already evident from the fact that joint pricing was necessary for the very existence of the joint venture. The necessity for the joint pricing of the Shell and Texaco brands of gasoline should have been evident on its face, because it was a natural consequence of the joint venture's formation. Nothing could have been more central to the joint venture's effective operation than pricing its products. The joint venture could not have operated at all as an

[6] *Dagher v. Saudi Refining Inc.*, 369 F.3d 1108, 1121 (9th Cir. 2004) (*citing* Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1188-89 (2001)).

[7] *Id.*

[8] *Id.* at 1122.

integrated production and marketing joint venture without setting a price for the gasoline it sold. The pricing arrangement was simply an internal rule on specific price levels, and it should have been upheld under the ancillary restraints approach enunciated by the Ninth Circuit.[9]

The Ninth Circuit should also have recognized that this Court has already decided that a joint venture's pricing arrangement for its own products should not be subject to per se condemnation. The uniform pricing of the Shell and Texaco brands of gasoline had no different effect on competition than the pricing arrangement at issue in *Broadcast Music, Inc. v. CBS, Inc.* ("*BMI*").[10] In *BMI*, this Court held that the rule of reason should apply to the decision by a group of copyright owners to create an association to offer a blanket license for their copyrighted music. The Court emphasized that "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price fixing schemes, where the agreement on price is necessary to market the product at all."[11]

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[9] *See* Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 Minn. L. Rev. 1, 57 (1991) ("The courts can most effectively determine the legality of ancillary restraints by considering how central the purposes are to the objectives of a joint venture. Courts should usually uphold restraints which establish internal procedures to insure the effective functioning of the venture.").

[10] 441 U.S. 1 (1979).

[11] *Id.* at 23. *See also* Thomas A. Piraino Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. Cal. L. Rev. 685, 727 (1991) ("Joint ventures often cannot achieve their purposes without restricting members' rights to freely price their products or deal with third parties. In *BMI*, for example, the effective marketing of musical compositions would have been impossible without the

(Continued on following page)

By applying the per se rule to internal joint venture pricing, the Ninth Circuit has placed in question the legality of most integrated marketing joint ventures operating in the United States today. Given the increased worldwide competition in manufacturing markets, domestic producers such as Parker are continually investigating ways of operating more efficiently in the United States marketplace. Marketing joint ventures such as the Shell/Texaco venture at issue in this case provide a means for United States manufacturers to maintain their viability in the face of increased competition from abroad. Subjecting the internal activities of such joint ventures to antitrust liability will deter domestic firms from collaborating with their competitors in innovative ways that enhance their efficiency.

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establishment of a uniform price for the members of the joint licensing venture."); Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors*, 86 Iowa L. Rev. 1137, 1198 (2001) ("Court should allow price-fixing agreements among the members of a joint venture when they are necessary to achieve the venture's legitimate objectives. Some marketing joint ventures are so broad that they could not meet their goals without the power to set prices. In *BMI*, the common price established by the musical composers was a critical aspect of the blanket license. Indeed, without an agreed price, the members' musical compositions could not have been made available to consumers on a collective basis at all."); XI Hovenkamp, *Antitrust Law* Par. 1908e, at 264 (2d ed. 2005) (stating that the per se rule should not apply to pricing agreements for joint venture products that "cannot be sold without an agreement between the owners as to the price that will be charged them").

CONCLUSION

For the reasons stated, the Ninth Circuit's decision in *Dagher* should be vacated.

Respectfully submitted,

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